Ernest Cheong Yong Yin (suing in the name and style Ernest Cheong PTL Chartered Surveyors) v Low Kim Yap & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S4–22–263 OF 2004
ROHANA YUSOF JC
20 APRIL 2006

Civil Procedure — Particulars — Material particulars in statement of claim — Failure to particularise defamatory statement — Whether letter from Board of Valuers informing plaintiff of complaint could form basis of defamation action — Whether claim was based on hearsay and speculative — Rules of the High Court 1980 O 78 r 3

Professions — Valuers — Complaint — Whether anyone affected by acts of registered valuer must be allowed to lodge complaint to Board of Valuers without fear of defamation suit against him

Tort — Defamation — Pleadings — Failure to particularise defamatory statement — Whether letter from Board of Valuers informing plaintiff of complaint could form basis of defamation action — Whether claim was based on hearsay and speculative — Rules of the High Court 1980 O 78 r 3

Tort — Defamation — Qualified privilege — Complaint against registered valuer to Board of Valuers — Defendants directly affected by act of the plaintiff but did not appoint plaintiff — Whether defendants had right to make complaint — Whether complaint was malicious

As owners and co-owners of certain lands, the defendants were notified by Federal Government Gazette Notification No 882 dated 1 February 2001 that part of their lands was to be acquired. All defendants had appointed CIMBL PTL (M) Sdn Bhd ('CIMBL') to be their consultant to assist them to seek compensation from the Government of Malaysia in connection with the acquisition. The plaintiff was a registered valuer under the Valuers, Appraisers and Estate Agents Act 1981 ('the Act'). He was appointed by CIMBL, of which he was a Director, to provide valuation services and to assist CIMBL to prepare individual valuation reports for each of the defendants. Some unhappiness occurred over the compensation issue which led to complaints being made by the defendants to the Board of Valuers ('the Board') against the plaintiff. The plaintiff, after having obtained information from the Board on the numerous complaints lodged by the defendants brought this defamation action against the defendants.

The defendants applied to strike out the plaintiff's claim on the ground of qualified privilege. The plaintiff had argued that the defendants had no right of complaint

against the plaintiff as valuer as the defendants appointed CIMBL and not the plaintiff directly and that the plaintiff should be distinguished from CIMBL.

The defendant also submitted that the statement of claim did not particularise the facts and matters relied upon by the plaintiff as required by O 78 r 3 of the Rules of the High Court 1980 ('the RHC'). This was because the plaintiff's cause of action was based on the reply letter from the Board ('exh EC-2'). Exhibit EC-2 was merely a letter from the Board informing the plaintiff of the complaint received and requiring the plaintiff to appear before the Enquiry Committee. Therein, the complaints were itemized to be answered by the plaintiff before the Enquiry Committee. The names of the defendants were listed as the complainants. This letter was being used by the plaintiff as the basis for his defamation action against the defendants.

The learned senior assistant registrar dismissed the application of the defendants to strike out the claim of the plaintiff. The defendants appealed.

Held, allowing the appeal and striking out the plaintiff's claim:

(1) The plaintiff's status as a registered valuer was subject to the respective laws regulating the registration. The plaintiff was appointed by a company of which he himself was a director. One could not expect his own company, CIMBL, to lodge a complaint against its own director. The defendants were the very people who were directly affected by the act of the plaintiff, a registered valuer who had clothed himself in the guise of a company to protect himself from the laws that govern his professional conduct (see para 5).

(2) The defendants were exercising their rights given by the law to complain against a registered valuer. The complaints were done in accordance with a written law that provides for a proper avenue of complaint. An express duty of the Board as set out in the Act is to maintain discipline and good governance amongst registered valuers who hold themselves out as professionals in the practice of valuation (see para 9). As such, complaints against professional conduct can be an important source of information for the Board of Valuers when assessing and determining whether or not a particular valuer deserves to be allowed to continue practice as a registered valuer. That is the whole purpose of this complaint mechanism. For this mechanism to work, defendants or anyone affected must be allowed to lodge any complaint in the manner provided by the law. If not legal, the defendants certainly had a moral and social duty to lodge the complaints that they did (see para 13). Litigation of the nature as in this case went against the very grain of instilling good ethics amongst professionals in particular and should be discouraged (see para 14).

(3) The defendants having shown that they have legal rights to complain, and the Board, quite clearly having a legal duty to receive the complaints, the defence of qualified privilege was available to the defendants (see para 15).

(4) The letter from the Board in EC-2 could not form the basis of the action by the plaintiff unless the Board itself is now being sued by the plaintiff. Thus the claim was based on hearsay and therefore speculative in nature (see para 18).

(5) A claim for defamation must be based on an original publication or statement and the alleged defamatory statement must be particularized in accordance with O 78 r 3 RHC. Both these requirements were absent in this case (see para 19).

(6) As the defendants had complied with the procedure for making complaints, no malice could be inferred. There was no evidence that the complaints were communicated to any person outside the complaint process (see para 20).

(7) Allowing a defamation suit of this nature to continue, would defeat the whole purpose of the complaint process set up by law and must not be encouraged. If claims of this nature were allowed, the floodgates would be open to defamation suits whenever disciplinary bodies receive complaints from the public against their members. The public should be free to lodge complaints as a means of recourse against what they perceive to be wrong or unprofessional conduct so long as they do so within the confines of the law. They should be allowed to do so without having to fear the possibility of legal action (see para 21).

[Bahasa Malaysia summary

Sebagai pemilik dan pemilik bersama beberapa bidang tanah, defendan-defendan telah dimaklumkan oleh Pemberitahuan No 882 Kerajaan Persekutuan bertarikh 1 Februari 2001 bahawa sebahagian daripada tanah mereka akan diperoleh. Kesemua defendan-defendan telah melantik CIMBL PTL (M) Sdn Bhd ('CIMBL') untuk menjadi pakar runding mereka untuk membantu mereka memohon pampas an daripada Kerajaan Malaysia berkaitan dengan pemerolehan itu. Plaintif merupakan jurunilai berdaftar di bawah Akta Penilai, Pentaksir dan Ejen-Ejen Hartanah 1981 ('Akta tersebut'). Beliau telah dilantik oleh CIMBL, yang mana beliau adalah seorang Pengarah, untuk memberikan khidmat penaksiran dan membantu CIMBL untuk menyediakan laporan-laporan penilaian berasingan untuk setiap defendan-defendan tersebut. Terdapat perasaan tidak puas hati berhubung isu pampasan yang menyebabkan aduan dibuat oleh defendan-defendan kepada Lembaga Penilaian ('Lembaga tersebut') terhadap plaintif. Plaintif, setelah mendapat maklumat daripada Lembaga berhubung pelbagai aduan yang dibuat oleh defendan-defendan telah memulakan tindakan fitnah ini terhadap defendan-defendan.

Defendan-defendan telah memohon untuk membatalkan tuntutan plaintif atas alasan perlindungan bersyarat. Plaintif telah berhujah bahawa defendan-defendan tiada hak untuk mengadu terhadap plaintif sebagai penilai kerana defendan-defendan yang melantik CIMBL dan bukan plaintif secara langsung dan plaintif sepatutnya dibezakan daripada CIMBL.

Defendan juga berhujah bahawa penyataan tuntutan tidak membutirkan fakta-fakta dan perkara yang plaintif bergantung kepada seperti yang dikehendaki oleh A 78 k 3 Kaedah-Kaedah Mahkamah TInggi 1980 ('KMT'). Ini adalah kerana kausa tindakan plaintif adalah berdasarkan surat jawapan daripada Lembaga ('eksh EC-2'). Ekshibit EC-2 hanya merupakan surat daripada Lembaga memaklumkan plaintif aduan yang diterima dan menghendaki plaintif hadir di hadapan Jawatankuasa Siasatan. Di sini, aduan-aduan dibutiri untuk dijawab oleh plaintif di hadapan Jawatankuasa Siasatan.

A Nama-nama defendan disenaraikan sebagai pengadu-pengadu. Surat ini digunakan oleh plaintif sebagai asas untuk tindakan fitnahnya terhadap defendan-defendan.

Penolong kanan pendaftar yang bijaksana telah menolak permohonan defendan-defendan untuk membatalkan tuntutan plaintif. Defendan-defendan telah merayu.

B

Diputuskan, membenarkan rayuan tersebut dan membatalkan tuntutan plaintif:

(1) Status plaintif sebagai penilai berdaftar tertakluk kepada undang-undang tertentu yang mengawal pendaftaran. Plaintif telah dilantik oleh sebuah C syarikat yang mana beliau sendiri adalah pengarah. Tiada sesiapa yang terfikir syarikatnya sendiri, CIMBL, akan membuat aduan terhadap pengarahnya sendiri. Defendan-defendanlah orang yang terjejas secara langsung oleh tindakan plaintif, penilai berdaftar yang berselindung di sebalik syarikat untuk melindungi dirinya daripada undang-undang yang mengawal perbuatan D profesionalnya itu (lihat perenggan 5).

(2) Defendan-defendan menggunakan hak mereka yang diberikan oleh undang-undang untuk mengadu terhadap penilai berdaftar. Aduan-aduan tersebut dibuat menurut undang-undang bertulis yang memperuntukkan ruang yang betul untuk membuat aduan. Tanggungjawab nyata Lembaga E sepertimana yang dinyatakan dalam Akta adalah untuk mengekalkan displin dan penguasaan baik di kalangan penilai-penilai berdaftar yang memegang diri mereka sebagai profesional dalam amalan penilaian (lihat perenggan 9). Oleh itu, aduan-aduan terhadap perlakuan profesional boleh menjadi sumber maklumat penting untuk Lembaga Penilai apabila menaksir dan menentukan sama ada atau tidak penilai tertentu itu patut dibenarkan meneruskan amalan F sebagai penilai berdaftar. Itulah tujuan sebenar mekanisme aduan ini. Untuk mekanisme ini berfungsi, defendan-defendan atau sesiapa yang terjejas hendaklah dibenarkan membuat apa-apa aduan menurut cara yang diperuntukkan oleh undang-undang. Jika tidak sah, defendan-defendan pastinya mempunyai tanggungjawab sosial untuk membuat aduan yang G mereka lakukan (lihat perenggan 13). Litigasi yang bersifat sebegini seperti dalam kes ini bertentangan dengan penerapan etika baik di kalangan profesional khususnya dan patut tidak digalakkan (lihat perenggan 14).

(3) Defendan-defendan setelah menunjukkan bahawa mereka mempunyai hak yang sah untuk mengadu, dan Lembaga, dengan jelas mempunyai H tanggungjawab yang sah untuk menerima aduan-aduan tersebut, pembelaan untuk perlindungan bersyarat wujud untuk defendan-defendan (lihat perenggan 15).

(4) Surat daripada Lembaga dalam EC-2 tidak membentuk asas tindakan oleh plaintif kecuali jika Lembaga sendiri sekarang ini disaman oleh plaintif. I Oleh itu tuntutan itu adalah berdasarkan dengar cakap dan bersifat spekulasi (lihat perenggan 18).

(5) Satu tuntutan untuk fitnah hendaklah berdasarkan satu penerbitan atau penyataan asal dan penyataan berunsur fitnah yang dikatakan itu hendaklah

dibutiri menurut A 78 k 3 KMT. Kedua-dua keperluan ini tiada dalam kes ini (lihat perenggan 19).

(6) Memandangkan defendan-defendan telah mematuhi prosedur membuat aduan, tiada unsur niat jahat dalam membuat inferens. Tiada keterangan bahawa aduan-aduan tersebut telah dimaklumkan kepada orang di luar proses aduan itu (lihat perenggan 20).

(7) Dengan membenarkan saman fitnah yang bersifat sebegini, akan menggagalkan keseluruhan tujuan proses aduan yang ditetapkan oleh undang-undang dan tidak patut digalakkan. Jika tuntutan bersifat sebegini dibenarkan, pintu akan terbuka untuk saman fitnah apabila terdapat badan tatatertib yang menerima aduan daripada orang awam terhadap ahli-ahlinya. Orang awam sepatutnya bebas untuk membuat aduan sebagai jalan keluar terhadap apa yang mereka anggap sebagai perlakuan yang salah atau tidak profesional selagi mereka berbuat sedemikian dalam batasan undang-undang. Mereka patut dibenarkan berbuat sedemikian tanpa perlu bimbang tentang kemungkinan tindakan undang-undang (lihat perenggan 21).]

Notes

For a case on material particulars in statement of claim, see 1 *Mallal's Digest* (4th Ed) Consolidated Subject Index para 4408.
For cases on pleadings, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 458–464.
For cases on qualified privilege, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 473–479.
For cases on valuers generally, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1574–1577.

Cases referred to

Adam v Ward [1917] 2 AC 15 (refd)
John Lee & Anor v Henry Wong Jan Fook [1981] 1 MLJ 108 (refd)
Karthak v Damai [1962] MLJ 423 (refd)
Workers' Party v Tay Boon Too & Anor [1975] 2 MLJ 124 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19, O 78 r 3
Valuers, Appraisers and Estate Agents Act 1981 ss 10, 32
Valuers, Appraisers and Estate Agent Rules 1986 rr 133A, 134,134A

Frederick S Walter (Vela, Walter & Associates) for the plaintiff.
SL Wong (Anne Wong with her) (SL Wong & Lim) for the defendants No 2, 4, 5, 7, 9, 10, 11, 12, 15, 17 and 18.

Rohana Yusuf JC:

[1] This is a notice of appeal by the defendants numbered 2, 4, 5, 7, 9, 10, 11, 12, 15, 17 and 18 (collectively, 'the defendants') in encl 57 against the decision of the learned senior assistant registrar dismissing the application of the defendants to strike

out the claim of the plaintiff under O 18 r 19 of the Rules of the High Court 1980. I have allowed the appeal of the defendants, and my reasons are set out below.

BACKGROUND FACTS

[2] As owners and co-owners of certain lands, the defendants were notified by Federal Government Gazette Notification No 882 dated 1 February 2001 that part of their lands was to be acquired for the purpose of upgrading Jalan Kelang Lama, Kuala Lumpur. All the 22 defendants in this suit appointed CIMBL PTL (M) Sdn Bhd ('CIMBL') to be their consultant to assist them to seek compensation from the Government of Malaysia in connection with the acquisition. Amongst the terms of the appointment were that:

(a) the fees to be paid to CIMBL would be 30% of the compensation finally awarded;

(b) valuation fees would be paid by the defendants to a valuer to be appointed by CIMBL; and

(c) CIMBL would have the exclusive rights to take all necessary steps towards obtaining the compensation.

[2] The Plaintiff is a registered valuer under the Valuers, Appraisers and Estate Agents Act 1981 ('the Act'). He was appointed by CIMBL, of which he is a Director, to provide valuation services and to assist CIMBL PTL to prepare individual valuation reports for each of the defendants. Some unhappiness occurred over the compensation issue which led to complaints being made by the defendants to the Board of Valuers ('the Board') against the plaintiff.

[3] The plaintiff, after having obtained information from the Board on the numerous complaints lodged by the Defendants, is now suing the defendants in a defamation action. The plaintiff is doing so under the name and style 'Ernest Cheong PTL Chartered Surveyors VE (3)0017' as a practising valuer.

THE DEFENCE OF QUALIFIED PRIVILEGE

[4] The main contention of the defendants in the striking out application under O 18 r 19 of the RHC is that the complaints made by the defendants were made on an occasion of qualified privilege. There was no direct response on this issue by the plaintiff. Instead the plaintiff put up the argument that the defendants had no right of complaint against the plaintiff as valuer as the defendants appointed CIMBL PTL and not the plaintiff directly and that the plaintiff should be distinguished from CIMBL PTL.

[5] I do not find merit in this argument. The plaintiff's status as a registered valuer is subject to the respective laws regulating the registration. The plaintiff was appointed by a company of which he himself is a Director. One cannot expect his own company, CIMBL PTL, to lodge a complaint against its own Director. Some of the defendants are made up of squatters and are not well-educated. They were

complaining against the plaintiff, amongst other things, for charging fees of 30% of their compensation award which they felt was excessive. If such complaint cannot be raised by those who are directly affected by the act of the plaintiff as a registered valuer, who else can lodge such a complaint? They are the very people who are directly affected by the act of the plaintiff, a registered valuer who has clothed himself in the guise of a company to protect himself from the laws that govern his professional conduct.

[6] Counsel for the defendants submitted that the defendant's right to complain against the plaintiff as a registered valuer is a right provided under the law. The Valuers, Appraisers and Estate Agent Rules 1986 (PU(A) 64 /1986) ('the Rules') is a subsidiary legislation made under s 32 of the Act. Under r 133A of the Rules, a complaint must be made in writing. The said r 133A provides that:

> (1) A complaint concerning the conduct of a registered valuer, appraiser or estate agent or a registered probation nary valuer or probationary estate agent shall be in writing ….....

[7] The defendants' complaints against the plaintiff were properly lodged with the Board in accordance with the required procedure under this rule. The Board of Valuers, Appraisers and Estate Agents is created by the Act. Amongst its main duties as laid out in s 10 of the Act, the Board is:

> (f) to hear and determine dispute relating to professional conduct or ethics of valuers;
>
> (g) to determine and regulate the professional conduct and ethics of valuers, appraisers and estate agents and to set standard of professional practice.

[8] Upon receiving complaints, the Board under r 134 of the Rules is to bring the complaints to a Complaints Investigation Committee that would be empanelled accordingly. Rule 134A sets out the procedures to be followed by the Complaints Investigation Committee.

[9] Clearly, the defendants were exercising their rights given by the law to complain against a registered valuer. The complaints were done in accordance with a written law that provides for a proper avenue of complaint. An express duty of the Board as set out in the Act is to maintain discipline and good governance amongst registered valuers who hold themselves out as professionals in the practice of valuation.

[10] I find the case of *Karthak v Damai* [1962] MLJ 423, an authority cited by Counsel for the defence, useful. In that case, the late Tun Mohamed Suffian Mohd. Hashim had occasion to decide on the issue of qualified privilege in the High Court at Alor Star. The facts in that case were these: a pupil in an army school alleged that the plaintiff had sexual relations with her and that she had consequently became pregnant. She lodged a complaint with the school authorities. During the ensuing investigations, the same allegations were repeated by her before the Enquiry Committee. A defamation suit was filed against her by the plaintiff. In deciding that the defence of qualified privilege was applicable, Tun Mohamed Suffian Mohd.

Hashim quoted the principle of law enunciated in the English case of *Adam v Ward* [1917] 2 AC 15 where Lord Dunedin stated that:

> … A privileged communication is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social or moral to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

[11] The Federal Court case of *John Lee & Anor v Henry Wong Jan Fook* [1981] 1 MLJ 108 is a clear authority on this point. In that case, the Federal Court held that the defence of qualified privilege applied in a case where the recipient of the alleged defamatory statement was a trade union known as SCEU. SCEU had a written agreement with commercial employers in Sarawak on behalf of their employees. The employers of the respondents were under a duty to make the charge to the recipient SCEU as a party who had a right or interest to receive it. The Federal Court also cited *Adam v Ward* and applied the same principle on this issue. The defence of qualified privilege was held applicable.

[12] The well enunciated principles governing qualified privilege require firstly, that a person who makes the complaint must have a duty whether legal, social or moral and, secondly, that the receiver of the complaint must have a corresponding interest in receiving it.

[13] There have been many complaints about declining standards of professionalism in the country. The respective bodies of each profession are tasked with the responsibility of maintaining good corporate governance and professional standards amongst their members. The Board of Valuers, being one such body, is entrusted with the responsibility of maintaining standards of professionalism amongst valuers. Towards this end, a complaint mechanism has been established in the Rules. The Rules provide for procedures to be used and the defendants have followed the steps stipulated in the Rules. Anyone with complaints against a registered valuer is duty bound to lodge such complaint for the Board to assess the conduct of the valuer and to decide on his continued registration which is another of the Board's duties under the Act. Such registration gives the public the confidence to deal with persons in that profession. As such, complaints against professional conduct can be an important source of information for the Board of valuers when assessing and determining whether or not a particular valuer deserves to be allowed to continue practice as a registered valuer. That is the whole purpose of this complaint mechanism. For this mechanism to work, defendants or anyone affected must be allowed to lodge any complaint in the manner provided by the law. If not legal, the defendants certainly had a moral and social duty to lodge the complaints that they did. The defendants should be commended for exercising their rights under the law to benefit the public at large.

[14] It is through the exercise of this duty that the quality and standard of professionalism can be maintained amongst professionals in the country. Much has been said about standards and about corporate governance amongst professionals. Litigation of the nature as in this case goes against the very grain of instilling good

ethics amongst professionals in particular and should be discouraged. In fact, the complaint mechanism relied on by the defendants in this case serves to instill better quality control and professional standards. At the same time, the procedures laid out serve to provide the necessary element of its confidentiality. The Board has also been given by the law the method of resolving the complaints and to take the appropriate steps to achieve the intended objective of maintaining a good code of ethics amongst registered valuers. This is one of the many ways of achieving world class human resources, aspired to by the nation.

[15] On the point of reciprocity required on the part of the receiver of the complaints, the Board is not only a body with a corresponding interest as in the case of *John Lee & Anor v Henry Wong Jan Fook* but it is also under a legal obligation as mandated by the law. The defendants having shown that they have legal rights to complain, and the Board, quite clearly having a legal duty to receive the complaints, I am in full agreement with the submission by counsel for the defence, that the defence of qualified privilege is available to the defendants.

DEFAMATORY STATEMENTS NOT PLEADED

[16] The second issue brought up by counsel for the defence is that the statement of claim did not particularise the facts and matters relied upon by the Plaintiff as required by O 78 r 3 of the RHC. This is because the plaintiff's cause of action is based on the reply letter from the Board exhibited in EC-2 of the plaintiff's affidavit in encl 47. Exhibit EC-2 is merely a letter from the Board informing the plaintiff of the complaint received and requiring the plaintiff to appear before the Enquiry Committee. Therein, the complaints were itemized to be answered by the plaintiff before the Enquiry Committee. The names of the defendants were listed as the complainants. This letter is being used by the plaintiff as the basis for his defamation action against the defendants.

[17] Counsel for the plaintiff in response argued that, whilst it is true that the statement of claim does not particularise the facts as required by O 78 r 3 of the RHC, the facts are within the full knowledge of the defendants.

[18] Obviously, the plaintiff does not have the original alleged defamatory statement made by the defendants. The letter from the Board in EC-2 cannot form the basis of the action by the plaintiff unless the Board itself is now being sued by the plaintiff. Thus, the claim is based on hearsay and therefore speculative in nature.

[19] In the case of *Workers' Party v Tay Boon Too & Anor* [1975] 2 MLJ 124, the speech which was alleged to be defamatory was a translation from Hokkien to English and was published as a news broadcast in English. Reliance on such a translated report was found by the appeal court to be fatal to the appellant's claim. The plaintiff in the present case has actually no clue as to what was actually written to the Board about him. He is merely guessing that something defamatory had been written about him on the basis of the letter from the Board. Relying on *John Lee*, the letter issued by the Board cannot form the basis of the plaintiff's claim against the defendants. A claim for defamation must be based on an original publication or

statement and the alleged defamatory statement must be particularized in accordance with O 78 r 3 of the RHC. Both these requirements are absent in this case.

ABSENCE OF MALICE

[20] As the defendants have complied with the procedure for making complaints, no malice can be inferred. There is no evidence that the complaints were communicated to any person outside the complaint process.

[21] Allowing a defamation suit of this nature to continue, defeats the whole purpose of the complaint process set up by law and must not be encouraged. If claims of this nature are allowed, the floodgates will be opened to defamation suits whenever disciplinary bodies receive complaints from the public against their members. The public should be free to lodge complaints as a means of recourse against what they perceive to be wrong or unprofessional conduct so long as they do so within the confines of the law. They should be allowed to do so without having to fear the possibility of legal action.

[22] I find this to be a plain and obvious case for the plaintiff's claim to be struck off and for all the above reasons, I allow the defendants' appeal to strike out the plaintiff's claim in encl 57 with costs.

Appeal allowed.

Reported by Loo Lai Mee